

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-1476

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

X

UNITED STATES OF AMERICA

Appellee

Docket No. 76-1476

-against-

BRADLEY BRANICK

Appellant

X

B
P/S

BRIEF ON BEHALF OF APPELLANT
BRADLEY BRANICK PURSUANT TO
ANDERS V. CALIFORNIA

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PRELIMINARY STATEMENT UNDER
SECOND CIRCUIT RULE 28

The judgment herein was rendered after a jury trial before United States District Judge Edward R. Neaher, in the United States District Court for the Eastern District of New York, which found the appellant Bradley Branick guilty of Counts 1, 2, 3, 4, and 5 of the indictment. Judgment of conviction was entered on October 8, 1976.

STATEMENT OF THE ISSUE

The sole issue in this case is whether there are any non-frivolous issues on appeal.

STATEMENT OF THE CASE

THE GOVERNMENT'S CASE

The appellant Branick was indicted together with Jeff Pierce and Barbara Tira on a five count indictment charging Branick, Pierce and Tira in the first count with conspiracy to import hashish oil in violation of Title 21, sections 955, 960 (a) (1), 960 (a) (2) and 963, United States Code. Count two charged all

three defendants with the actual importation of hashish oil on April 4, 1976.

Count Three charged all three with possession with intent to distribute the hashish oil on April 4, 1976 in violation of Title 21, section 841 (a) (1) and Title 18, section 2, United States Code. Count four charged Branick and Tira with the importation of hashish oil on April 8, 1976 and Count five charged Branick and Tira with possession with intent to distribute the same.

Trial commenced on June 14, 1976. After a suppression hearing where suppression was denied, the first witness for the Government was Customs Inspector Rayphael McCaffrey. McCaffrey testified that in the course of examining the luggage of Jeff Pierce, at Kennedy Airport, on April 4, 1976, he found a quantity of hashish oil in his suitcase. His passport showed that he had come from Karachi in Pakistan. He placed Pierce under arrest. On April 8, 1976 he examined the baggage of Bradley Branick at Kennedy Airport and found no contraband.

Customs Inspector Francis Daly was then called and testified he was on duty at Kennedy Airport on April 8, 1976 when Barbara Tira presented herself for customs inspection. On examining her suitcase he found that it contained hashish oil and she was placed under arrest. Robert Henderson, a chemist employed by the Drug Enforcement Administration testified that he tested the substance found in possession of Pierce and Tira and found it to be hashish oil in the amount of 4.01 kilograms. The hashish oil and the bags were admitted in evidence.

Jeffrey Pierce was then called by the Government. He admitted his arrest on April 4th, 1976 and then said that he had an agreement with the Government whereby he would plead guilty to the conspiracy count and testify for the Government. He said he had met Branick in Tucson, Arizona, in 1972. Later in 1972 he again met Branick and in the presence of one Sheuneman he said that Branick offered him a chance to go to Pakistan, pick up hashish oil, and that he would receive \$10,000. He went to Pakistan and Afghanistan where he met Branick and carried back hashish oil to Tucson, Arizona where he received \$7,500. for his part. Again in early

1973 he met Branick with Tira and they obtained visas to Pakistan and then flew there in July, 1973. He and Tira carried hashish oil back to the United States and he received a portion of the hashish oil as his payment.

In 1975 he met Branick again in Tucson and they made arrangements for another trip to Pakistan. He went to Pakistan, where he met Tira and Branick, received a suitcase with hashish oil and came back to the States. Branick told him he would follow him with Tira shortly. He stated he was arrested with the hashish oil at Kennedy Airport on April 4, 1976 and involved Branick and Tira in his statements to the agents.

Mark Sheuneman was called for the Government and stated he was present in Tucson, Arizona, and Branick offered Pierce money to go to Pakistan and bring hashish oil into the United States.

Agent John Trustey of the D.E.A. then testified as to his arrest of Pierce on April 4, 1976, and the statements made by Pierce involving Branick. He then said he arrested Tira on April 8, 1976 and Branick was arrested at the same time. He saw hashish oil in Tira's suitcase and among other things she admitted being with Branick in Karachi and returning to the States with him.

THE DEFENSE CASE

Bradley Branick took the stand in his own defense. He testified that he started a business in Tucson called World Handicrafts in 1974 which was a store selling rugs and other imported hand made articles. Certain invoices and records of his purchase of rugs from Pakistan were put in evidence. He stated that in the course of his rug dealings he had occasion to make trips to Pakistan.

On his first trip to Afghanistan he met Jeff Pierce in Kabul in that country. Pierce was a tourist. He further testified that he went to Pakistan in 1973 with Tira and that Jeff Pierce came along with him as a tourist. When they reached Karachi, Pierce left him and he saw him no more on that trip. In 1976 he stated that Tira wanted to go to Pakistan with him to study the Montessori method of teaching and Pierce asked to go along as a tourist. He bought tickets for Pierce and Tira and had no contact with Pierce in Pakistan. He denied any traffic in hashish oil and stated that he did not know there was hashish oil in Tira's suitcase.

The jury found Branick guilty on all 5 counts of the indictment.

POSSIBLE ISSUES ON APPEAL

The only possible issue on appeal is whether the testimony concerning Pierce's activity with Branick in the importation of hashish oil in 1972 and 1973 was properly admissible as a prior similar act.

All of the other issues were issues of fact which were decided by the jury against Branick. The question of the existence of the conspiracy in 1976 was proven by the testimony of Jeffrey Pierce which was accepted as true by the jury. The entire conspiracy issue was adequately proven by Pierce's testimony as a co-conspirator plus the seizure of hashish oil from Pierce on April 4, 1976 and the hashish oil from Tira while she was travelling in Branick's company on April 8th.

Count Two was sufficiently proven as to Branick as the jury, under instructions from the Judge undoubtedly found him guilty under Title 18, Section 2 United States Code which states:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

The jury believed Pierce's testimony as their verdict shows, so that under this section, Branick could be convicted. It is interesting to note that this count deals with the April 4, importation and Tira was acquitted as to that.

The same reasoning was applicable to Counts Three, Four and Five. Count Four also dealt with the possession of the April 4 shipment and Tira was acquitted of that. Counts Four and Five dealt with the shipment of hashish oil brought in by Barbara Tira on April 8th, and as the jury accepted the testimony of Pierce as to the entire transaction, they properly convicted Branick of these counts.

The trial court permitted evidence as to the importation of hashish oil by Pierce and Branick in 1972 and 1973. The testimony of Pierce was the source of this evidence.

Rule 404 (b) of the Federal Rules of Evidence provides:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Advisory Committee's Note to Rule 404 (b) indicates that the list of issues on which similar act evidence is admissible is not exclusive and that ultimately the trial court's discretion must be exercised in light of Rule 403.

As the Senate Judiciary Committee report noted:

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusions or waste of time.

S. Rep. No. 93-1277, 93d Cong., 2d Sess. 24-25 (1974).

It is the settled law in this circuit that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character or disposition. United States v. Johnson, 525 F.2d 999, 1006 (2d Cir. 1975); United States v. Campanile, 516 F.2d 288 (2d Cir. 1975); United States v. Gerry, 515 F.2d 130, 140-141 (1975); United States v. Papadakis, 510 F.2d 287, 294-295 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Miller, 478 F.2d 1315 (2d Cir. 1973); United States v. Williams, 470 F.2d 915, 917 (2d Cir. 1972); United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970) United States v. Johnson, 382 F.2d 280, 281 (2d Cir. 1970); United States v. Deaton, 381 F.2d 114 (2d Cir. 1967). See generally 2 Weinstein's Evidence, 404 -(08)-(09) (1975); II Wigmore on Evidence, Sec. 300-08 (3d ed. 1940).

The Government is entitled to introduce such evidence in its direct case in order to meet its burden of establishing the essential elements of the offense charged. It need not wait until such elements are put in issue by the defendant. United States v. Johnson, supra, 382 F.2d at 281; United States v. Deaton, supra, 381 F.2d at 118 n.3; United States v. Byrd, 352 F.2d 570 (2d Cir. 1965).

Under these cases the authority for the admission of the evidence of prior identical importation of hashish oil, using the same modus operandi in each of the prior incidents, is overwhelming.

The trial court properly allowed Pierce to testify as to these prior identical acts in which he and Branick participated.

There are no other questions of law which could properly be raised on appeal. All of the other issues were questions of fact which were resolved against this defendant by the jury. There are no non-frivolous issues on which to appeal.

CONCLUSION

For the above stated reasons, there are no non-frivolous issues which can be raised on appeal. Accordingly it is respectfully requested that JOHN C. CORBETT be relieved as counsel on this appeal.

Respectfully submitted,

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